1959

Joseph H. Dupler et al v. Maurice Yates : Brief of Respondent

Utah Supreme Court

Halliday & Halliday; Gustin, Richards & Mattsson; Attorneys for Defendant and Respondent;

Case No. 9048

IN THE SUPREME COURT

of the

STATE OF UTAH

JOSEPH H. DUPLER, L. HOWARD MARCUS, B. M. ROE and DAVID I. ZINIK,

Plaintiffs and Appellants,

—vs.—

MAURICE YATES,

Defendant and Respondent.

BRIEF OF RESPONDENT

HALLIDAY & HALLIDAY
GUSTIN, RICHARDS & MATTSSON

Attorneys for Defendant and Respondent

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BRIEF OF RESPONDENT

Plaintiffs (Appellants) concede that their Brief deals in generalities. They do not attempt to rationalize their position with the allegations of their complaints in the Wyoming cases against the Aimonettos and Simmons and other matters that were before the trial court on the motion for summary judgment. Inasmuch as defendant contends that the complaint in the instant case is dissipated by the proceedings initiated by the plaintiffs in the civil actions in Wyoming and the matters incident

thereto, we deem it appropriate, and in order to make more comprehensive the ruling on the motion for summary judgment, to restate the facts with emphasis on the matters that refute and contradict the essential elements attempted to be stated in the present complaint.

STATEMENT OF FACTS

(a) *The Aimonetto Transactions*

The first three causes of action involve specific interests in United States Oil and Gas Lease, Wyoming Serial 013425, sold by Joe and Leo Aimonetto. Dupler alleges that on the 15th day of March, 1954, he paid $30,000.00 to the Aimonettos "for a one-half interest in the one-fourth interest in said oil and gas lease" as it pertained to the SW¼ of the NE¼ of Section 11, Township 41 North, Range 66 West, Weston County, Wyoming (first cause of action); that on or about February 16, 1954, he paid the Aimonettos $17,500.00 for a one-fourth interest in the lease as it covered the SW¼ of the SW¼ of Section 2, same township and range (second cause of action); that he paid $7,000.00 to the defendant Yates, who, it is alleged, on or about the 16th day of January, 1954, falsely represented that he had purchased 5% "of said oil well" for Dupler from the Aimonettos (third cause of action).

On February 7, 1955, Dupler filed an action in the District Court of the United States for the District of Wyoming against the two Aimonettos, Exhibit "D" in the instant case. The complaint in Wyoming sets forth

three causes of action and alleges payment by Dupler to the Aimonettos of the $30,000.00, the $17,500.00 and the $7,000.00 mentioned above. As to the $7,000.00 item Dupler, in his complaint against the Aimonettos (page 3), alleged in part as follows:

> "8. * * * defendants, by means of a long distance telephone communication between Newcastle, Wyoming and Palm Springs, California, offered and agreed to sell to plaintiff, and plaintiff agreed to purchase, for a cash consideration of $7,000.00 plus a portion of the completion costs of a well thereon an undivided five per cent (5%) working interest in and to the same and identical oil and gas lease as is described above, covering the same lands as are described in paragraph 6 above.
>
> 9. Thereafter, defendants, * * * caused * * * delivery to plaintiff after sale a written assignment, dated March 5, 1954, of an undivided five per cent (5%) working interest in *** the lands described in paragraph 6 above. Plaintiff paid to defendants for said security a cash consideration of $7,000.00."

In the Wyoming action Dupler asserted that the Aimonettos had defrauded him in the particulars described in sub-paragraphs (a) through (r) of paragraph numbered 3 of the second and third causes of action (pages 4-10, Exhibit "D"). Portions of such allegations are:

> "(a) On or about December 20, 1953, defendant Joe Aimonetto represented in person to plaintiff, *** as an inducement to get plaintiff to purchase the securities described above, that Well

No. 1, which was drilled by defendants on the SW¼SE¼ of Section 11, *** had a greater prospective income producing power than it had in truth and in fact.

(b) At the time and place aforesaid, defendant Joe Aimonetto represented to plaintiff that Well No. 1 had a value greater than it had in truth and in fact.

(c) At the time and place aforesaid, defendant Joe Aimonetto represented in person to plaintiff that Well No. 1 was producing at a rate greater than it was in truth and in fact.

* * *

(k) On or about February 14, 1954, defendants represented in person to plaintiff that an equal undivided fractional working interest in said lease had been sold to another for a consideration identical to that which was paid to defendants by plaintiff, and which representation was false.

* * *

(p) Between February 8, 1954 and May 1, 1954 defendants represented to plaintiff on several occasions that Well No. 2, which was drilled by defendants on the SW¼SW¼ Section 2, Township 41 North, Range 66 West, a part of said lease, had a producing potential and capacity equal to or in excess of, and would produce as much oil, if not more, than Well No. 1, when, in truth and in fact, Well No. 2 was so drilled or so located as to have a much smaller potential and capacity.

(q) On or about March 5, 1954 when defendants sold plaintiff an undivided 5% working interest in and to said lease as to the lands last above

described, defendants omitted to state or disclose to plaintiff that an additional five per cent undivided interest in the same lands was being assigned to a third person as a commission for the sale of said security to plaintiff."

Dupler alleged that he "first learned of said untruths and omissions during on or about the month of June, 1954," and that he has elected to rescind said transactions and "hereby offers" to reassign the interests to the Aimonettos (Page 9, Exhibit "D"). In the instant case the plaintiffs say that they did not discover the facts constituting the alleged fraud "until June, 1956." The instant action was commenced by service of a summons on October 9, 1957 (R. 13).

Plaintiff B. M. Roe filed suit against the Aimonettos in the Wyoming Federal Court on February 24, 1955 (R. 65-72), alleging payments to the Aimonettos totaling $10,500.00, the amount that Roe is seeking to recover from the defendant in the instant case (second cause of action). Of the total amount that Roe alleges he paid the Aimonettos, $7,000.00 was paid for an undivided 5% working interest in the same lease involved in the Dupler-Aimonetto suit as it covers Section 2. $3,500.00 of said amount was for a 2½% working interest in the same lands. Allegations with respect to the fraud allegedly perpetrated upon Roe by the Aimonettos are particularized in subsections (a) through (g) of paragraph 3 of the second cause of action in the Wyoming suit, which allegations are in part as follows:

"(a) On or about February 22, 1954, at a time

when plaintiff and defendant Joe Aimonetto were present in Las Vegas, Nevada, and, again, on or about February 27, 1954 and on or about March 5, 1954, by means of written assignments respectively dated February 25, 1954 and March 5, 1954, *** defendants represented to plaintiff a greater ownership and interest in *** Lease Serial No. Wyoming 013425, covering, among other lands, the SW¼SW¼ of Section 2, *** than they, in truth and in fact, had.

* * *

(c) On or about February 22, 1954, at which time defendants sold plaintiff an undivided five percent (5%) working interest *** and, again, on or about March 5, 1954, at which time defendants sold plaintiff an undivided two and one-half percent (2½%) working interest *** defendants omitted to state to plaintiff that said lease was subject to certain royalties, overriding royalties, free interests, drilling requirements and other burdens and omitted to state that a part of the working interest therein was owned by persons other than defendants.

* * *

(e) On or about March 5, 1954, when defendants sold plaintiff an undivided two and one-half percent (2½%) working interest in and to said lease as to the lands above described, defendants omitted to state or disclose to plaintiff that an additional fractional undivided interest in the same lease and lands was being assigned to a third person as a commission for the sale of said security to plaintiff.

(f) On or about February 22, 1954, defendant Joe Aimonetto represented in person to plaintiff

> at Las Vegas, Nevada that Well No. 2, which was to be drilled by defendants *** had a producing potential and capacity equal to or in excess of, and would produce as much oil, if not more, than Well No. 1, when, in truth and in fact, Well No. 2 was so drilled or so located as to have a much smaller potential and capacity. ***".

Plaintiff Roe in his Wyoming action states, as does Dupler, that he has elected to rescind the transactions and offers to reassign the identical securities described. He also alleges that in the exercise of due diligence he first learned of the alleged untruths and omissions "during on or about the month of June, 1954." The Roe-Aimonetto suit is based upon the same sections of the Securities Act of 1933 as is the Dupler-Aimonetto suit. including the allegation that the transactions, practices and course of business operated as a fraud and deceit upon the plaintiff.

Plaintiff Zinik filed his action in the Wyoming Federal Court against the Aimonettos on February 21, 1955 (R. 75-82) for sums totaling $10,500.00, the amount that he is claiming by the second cause of action in the instant case. The allegations of the Zinik-Aimonetto action are substantially the same as those contained in the Roe-Aimonetto suit, including the allegation of rescission, tender of the securities and that the particulars with reference to the alleged fraud were first learned "during or about the month of June, 1954."

Under date of August 20, 1956, Dupler, Roe and Zinik entered into an agreement with the Aimonettos

(R. 57-61) for the reworking of the two wells on the above mentioned properties and putting them back on commercial production. The agreement provided for the method of obtaining the costs and expenses of the work to be undertaken and contemplated the dismissal with prejudice of the three actions filed against the Aimonettos in the Wyoming Federal Court. Paragraph 4.3 of the agreement reads:

> "Upon the signing of this agreement, the Aimonettos shall cause all steps to be undertaken and diligently prosecuted as may be necessary to carry out the intent of this agreement, and in consideration thereof and of the covenants of the parties hereto, it is expressly understood and agreed that all claims and accounts existing between said parties up to and including date hereof are hereby discharged, released, settled, and compromised; and that the above-mentioned civil cases shall be dismissed with prejudice." (R. 61)

The agreement mentioned above contemplated the participation of plaintiff Marcus who thereafter ratified, approved and confirmed the same and agreed to be bound by the terms thereof. (Request for Admission of Facts, R. 55, deemed admitted under Rule 36(a), *Utah Rules of Civil Procedure.*)

Pursuant to the agreement with the Aimonettos the order of dismissal with prejudice was entered in each of the three cases on October 25, 1956 (R. 73, 83 and Exhibit "E").

(b) *The Simmons Transactions*

The fourth cause of action involves a 50% working interest in an oil and gas lease covering the SW¼ of the NE¼ of Section 34, Township 42 North, Range 66 West, Weston County, Wyoming, the subject of a contract of sale between plaintiffs and the defendant on the one hand and C. B. Simmons on the other hand. Pursuant to the contract Simmons executed assignments of the 50% working interest, divided 10% to Dupler for which he paid $15,500.00, 10% to Yates for which it is alleged Yates represented that he had paid $15,500.00, 10% to Marcus for which he paid $15,500.00, 12½% to Roe for which he paid $19,275.00 and 7½% to Zinik for which he paid $11,625.00, in all totaling $77,500.00. The plaintiffs pray judgment against Yates for a total of $62,000.00 (R. 42-45).

On March 30, 1955, Dupler, Roe, Zinik and Marcus filed an action in the District Court of the United States for the District of Wyoming against Simmons et al., Civil action 3869, for the return to them of the $62,000.00 paid as stated above, and alleged that they had elected to rescind said sales "and hereby offer to re-assign to defendants" the various percentages of working interests in said oil and gas lease (Exhibit "A"). The action resulted in a judgment in favor of the plaintiffs (*Dupler et al. v. Simmons et al.*, 163 F. Supp. 535). The appeal by Simmons to the Tenth Circuit was dismissed pursuant to stipulation of the parties (268 F.2d 217). The plaintiffs alleged that they had been defrauded by Simmons in certain particulars in part as follows:

"(a) On or about March 26, 1954, as an inducement to plaintiffs to buy the securities hereinabove described, defendants represented and warranted to plaintiffs at Newcastle, Wyoming that, in drilling a well, hereinafter identified as Well No. 3, *** defendants would employ a special device, for which they had the exclusive use, and that this special device when used in drilling Well No. 3 would make five oil well openings instead of one in Well No. 3, which representation, in truth and in fact, was false. This special device was never used by defendants in drilling Well No. 3.

* * *

(c) At the time and place last stated, defendants, in order to induce plaintiffs to purchase the securities hereinabove alleged, represented to plaintiffs that Well No. 3 when drilled, would produce over 1,000 barrels of oil per day, which representation, in truth and in fact, was false.

* * *

(g) On or about March 26, 1954, defendants represented to plaintiffs at Newcastle, Wyoming that after the total consideration of $62,000.00 had been paid by plaintiffs to defendants for their respective interests in said lease plaintiffs would receive a 100% return on their investments within 18 months, which representation, in truth and in fact was false."

The plaintiffs in the Wyoming action alleged that they first learned of the untruths and omissions relied upon by them "during on or about the month of June, 1954."

Exhibit "M" in the instant case is the formal demand made by Dupler, Marcus, Roe and Zinik upon Sim-

mons for the repayment of the sum of $62,000.00 and the formal offer to reassign and relinquish to Simmons the various percentages of plaintiffs in the leasehold interest. The demand expressly excludes the defendant Yates, but nevertheless designates his percentage interest as being 10%.

Portions of the deposition of Dupler taken in the Simmons case were before the court in the instant action through the medium of Exhibit "C". Portions of the testimony of Dupler, Marcus, Zinik and Roe given in the trial of the Simmons action were before the court in the instant case through the medium of Exhibit "B". Specific reference will be made hereafter to the previous testimony of the plaintiffs, and particularly with regard to the allegations of the complaint insofar as it alleges a material representation of fact by the defendant Yates and plaintiffs' reliance upon the same.

(c) *Statute of Limitations*

In addition to the matters alleged in the Simmons and Aimonetto cases as constituting the fraud and deceit therein relied upon, and concerning which the plaintiffs by their various pleadings stated they had knowledge of during or about the month of June, 1954, as contrasted with the allegations in the instant case to the effect that they did not know of the alleged fraudulent conduct of Yates "until June, 1956," there are the affidavits of J. Bracken Lee, Ramon N. Bowman, Dr. Rowland H. Merrill, Leland B. Flint, Thomas Yett, Maurice Anderson and Jess Wort (Exhibits "F" through "L") in the

instant case. Certain of the affidavits, concerning which we will have more to say, attribute statements to Dupler and Zinik reflecting upon the integrity of the allegations of discovery of the alleged wrongdoing on the part of defendant Yates as alleged in the instant case. One or more of the affidavits corroborate the matters contained in the Aimonetto and Simmons complaints and the testimony of the several plaintiffs in the Simmons suit to the effect that plaintiffs had knowledge of defendant's activities in connection with the Wyoming leases more than four years prior to the commencement of the present action.

(d) *The Amended Complaint*

The first and third causes of action (R. 35-37 and R. 40-41 respectively) are on behalf of the plaintiff Dupler. The second cause of action (R. 37-39) is brought by the plaintiffs Dupler, Zinik and Roe and all three causes have to do with the Aimonetto transactions as outlined above, the several plaintiffs asking by way of damage from the defendant Yates the various sums of money that they previously paid to the Aimonettos. The fourth cause of action (R. 42-44) is brought by all of the plaintiffs, including Marcus, for the recovery from defendant of the money paid by them to C. B. Simmons for their respective interests in those transactions. The fifth cause of action (R. 45-49) combines and restates in somewhat of a narrative form the other four causes of action. The amended complaint, along with the proposed amendment to amended complaint (R. 92-94), proposed to be filed

after the court had entered its summary judgment of dismissal, will be discussed under the appropriate points that are to follow and by way of argument.

STATEMENT OF POINTS RELIED UPON

The entire issue on this appeal is whether the trial court erred in granting summary judgment in favor of the defendant upon the premise that the amended complaint and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law as provided by Rule 56(c), *Utah Rules of Civil Procedure*. In support of the judgment appealed from and the point that plaintiffs urge in the refusal of the trial court to permit the further amendment to the amended complaint, we urge the following:

POINT I.

THE AMENDMENT WAS PROPERLY REFUSED.

POINT II.

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT INVOLVING THE SIMMONS TRANSACTIONS

POINT III.

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT INVOLVING THE AIMONETTO TRANSACTIONS.

POINT IV.

THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT.

POINT V.

PLAINTIFFS' ACTION IS BARRED BY SUBSECTION (3) OF SECTION 78-12-26, *UTAH CODE ANNOTATED* 1953.

ARGUMENT

POINT I.

THE AMENDMENT WAS PROPERLY REFUSED.

Plaintiffs premise their argument on this point upon the proposition that the trial court committed prejudicial error in not permitting them to further amend their amended complaint after summary judgment. By their argument they reflect upon the prejudicial effect of the refusal by saying, in effect, as they do on page 7 of their brief, that they believe the amendments not to be "absolutely necessary." If the proposed amendments were not necessary, the rejection of the same could not be prejudicial. See *Hoover v. Lacey,* 80 F. Supp. 691.

While leave to amend pleadings shall be freely given "when justice so requires", the liberality of the rule is not without limit, particularly when no amendment of substance is contained in the offered amendment. *Davis Stock Co. v. Hill,* 2 Utah 2d 20, 268 P. 2d 988. The rule permitting amendments is directed to the sound discretion of the court and no abuse of discretion is shown. Plaintiffs' offered amendment contained nothing new and not previously before the court.

POINT II.

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT INVOLVING THE SIMMONS TRANSACTIONS.

The fourth cause of action (R. 42-45) involves a 50% working interest, the subject of a purchase and sale agreement dated April 3, 1954, between C. B. Simmons, as seller, and Dupler and Yates, as buyers, which work-

ing interest was assigned to plaintiffs as stated above. By the contract the money to be deposited was "for the expense of drilling and completing" a well. It is alleged that the defendant represented to the plaintiffs "that the plaintiffs and defendant had to put up the sum of $77,500.00 in order to acquire a 50% interest ***." It is alleged that this representation was knowingly false and untrue, was made for the purpose of deceiving the plaintiffs and inducing them to put up money for the acquisition of said 50% interest. It is also alleged that in reliance upon this representation, and other representations to be hereafter noted, the plaintiffs between the 13th day of May, 1954, and the 1st day of June of that year "paid to the said Simmons and defendant" the specific amounts hereinabove set forth in connection with plaintiffs' action in the suit brought by them against Simmons in Wyoming and for which amounts they now seek to recover against Yates.

In the deposition of Dupler taken in the Wyoming action, Exhibit "C" in the instant case, Dupler testified in part as follows:

"Q. Now, Mr. Dupler, *** when did you first meet Mr. Simmons?

A. Some time in March, 1954, the latter part of March.

Q. Where was that?

A. At the Antlers Hotel.

Q. And how long had you been in Newcastle at that time before you met Mr. Simmons?

A. I believe we got in that day, some time during

that day.

Q. Who do you mean by 'we'?

A. With a party by the name of Howard Marcus.

Q. Who is he?

A. He's one of the men that has an interest in—

Q. I see, one of the plaintiffs in this case, and what was the purpose of your going to Newcastle at that time?

A. We had an interest at that time in a couple of oil wells.

Q. Was that the Aimonetto stuff?

A. Yes.

Q. How long before this time did you acquire the interest in the Aimonetto property?

A. Well, it was some time in January, I believe.

Q. Of the same year?

A. Yes.

Q. And was that a completed deal at that time, the Aimonetto deal, or was that still pending?

A. When was this?

Q. At the time you met Mr. Simmons?

A. That was completed.

Q. The Aimonetto deal?

A. Yes.

* * *

Q. Who is Mr. Yates?

A. He's a party that has an interest in this oil well.

Q. Is he connected in this lawsuit?

A. He's not connected with the lawsuit, but he

has an interest or did have an interest. (Page 2)

Q. Go right ahead in your own words.

A. And then Mr. Simmons started talking to us and he started telling us how bad these Aimonetto boys were and that they are no good, that he wants people to come into Newcastle, he wants them to make some money. and one of his words was, want to put the nose bag on you fellows so you fellows can make some money. I remember that word distinctly.

* * *

the next morning we met with Mr. Simmons. and when I say 'we,' Mr. Yates and myself. Mr. Yates stayed there about two minutes and he excused himself, he had some other private business to take care of. Then the conversation started.

Q. What happened then?

A. Mr. Simmons had two deals. One deal, if I recall correctly, it was a completed well that, either 120 acres or 160 acres that he thinks could be bought for about $200,000.00. Then he had this tract which was called No. 3 of 40 acres, and he was talking about that, and he says that that deal is surrounded by big producers and that this tract there with the device that he has exclusive on could be made into the largest producer in the field, and it would produce not less than a thousand barrels of oil per day. He brought out this catalog—well, it was a brochure is what it was, and he showed me the picture of this device, and he says instead of having just one hole, you would have five or six different

holes. I don't recall just how many. I know the prongs—I remember it had four prongs on it.

Q. But it was close to the Aimonetto lease?

A. Yes, and that was surrounded by some oil wells, was supposed to have been some big producers, I understood. Now, this could have been later on or that afternoon. Now I can't recall at this moment.

* * *

A. All I can tell you is that I know I was out there, and whether it was that day or maybe a week or two or three later, but I imagine it was that day because I was impressed with all these oil wells around this 40 acres of land.

Q. There was nothing on the 40 acres at that time?
(Page 3)

A. No, sir.

Q. You saw the other wells?

A. They were close by.

* * *

A. We got back to Salt Lake City, and I met with Dave Zinik, Ben Roe and Howard Marcus.

* * *

A. And we talked things over, and then we got together — Mr. Yates was back in town and we talked to him. Then, oh, it must have been a week later from the time I left Newcastle, about a week later, Mr. Yates placed a call to Mr. Simmons from Mr. Zinik's office. All the boys were there, and Mr. Simmons wanted $90,000.00 for fifty per cent of the well, and then I took the telephone, *and we com-*

promised at $77,500.00, and he told us or he told me rather to have my attorney draw up the papers in Salt Lake City because if he had them drawn up, there may be a lot of changes made and so forth back and forth that would delay the starting of this well, so there was papers drawn. They were sent to Newcastle. They were signed, I think, by Mr. Simmons. They was returned to Salt Lake City.

* * *

Q. Go ahead. Then what happened. This agreement was between you and Yates and Simmons?

A. *No, but I was the agent for Mr. Zinik and Mr. Roe and Mr. Marcus.*

Q. It starts out, in agreement between Mr. C. B. Simmons and Dupler and Yates, the second parties. I see, the first party agrees to deliver assignments to Dupler, Yates, Marcus, Roe, and Zinik—I see. Go ahead.

A. *I was merely their agent.*

Q. Now, the money was to be put at the bank until the well was drilled?

A. Until they —

Q. Hit the sand?

A. The sand.

Q. Was that done? Was the well drilled?

A. Yes, sir.

Q. *Is Yates still in this deal?*

A. *Sir, I couldn't tell you what deal he is in.*

Q. Why was the money turned over? (Page 4)

A. Because our agreement was when they hit

the sand, that we were supposed to turn the money over.

Q. So you turned it over in compliance with the agreement then?

A. Yes.

* * *

Q. You say you turned it over—Yates handed you the paper to sign?

A. Yes.

Q. So you relied on Yates who was your partner?

A. *I didn't rely upon Yates to turn the money over.* I saw the Schlumberger.

* * *

Q. You are saying now that in purchasing this oil, this lease, that you relied upon the use of that device as your reason for participating in the thing, or to what extent did you put it that way?

A. To what extent?

Q. Yes.

A. I will give you a simple figure.

Q. That's what I want.

A. Mr. Simmons took out a pencil and paper out of his pocket, or he had a piece of paper lying there, and he says, 'If this oil produced 1,000 barrels of oil per day,' he says, 'I have a contract.' I don't (Page 5) know with who he had it. 'We can get $2.40 or $2.50,' I don't recall the figures, 'for the oil. Within three months to eighteen months, you will get your money out and double it.'

Q. I see. That's what you relied on then?

A. After all was said and done, when a man

makes a statement of that type and shows you figures and tells you he has this device and what this is going to be—

Q. I see, and that was done before the well was started?

A. Yes, that's what took place. That's what took place in the room downstairs, not upstairs, downstairs between he and I in the apartment where we were supposed to be. He pulled the pencil and paper out. He's got a contract for all the oil he can deliver, whether $2.40 or $2.50 a barrel, and the well is to produce at least a thousand barrels a day. My God, it was box car numbers, and I didn't know. Maybe he was right and maybe he was wrong, but I thought he was right. He was an oil man.

Q. *That's what you relied on then?*

A. *Surely.*

Q. Other than that, what other so-called misrepresentations did he make to you or fraudulent statements or things that were wrong outside of that representation there? What else did he say?

A. Well, he said so much—he kept on talking.

Q. That's what I want to find out.

A. I can't recall all of the conversation, but he was going to make us fellows rich.

Q. All right. That's another thing you relied on?

A. *He was going to make us rich.*

Q. *You relied on that?*

A. That's right.

Q. He didn't make you rich?

A. He didn't make us rich.

Q. Say, by the way, for the record, who is Mr. Zinik? Give us his name and what he does. I might want to contact him.

A. Mr. Zinik is in the sporting goods business. It's at 115 South Main.

Q. How about Mr. Roe?

A. Mr. Roe has offices on the ninth floor in the Deseret Bank Building.

Q. Salt Lake?

A. Yes.

Q. What does he do?

A. He's retired.

Q. What's your association with them, Mr. Dupler?

A. Just personal friends.

Q. You are not associated with any business venture?

A. We could be. I wouldn't say we are not associated. We could be in some other ventures, yes.

Q. My point is, how did you happen to go back to Salt Lake and look up these two men to share in this (Page 6) venture instead of some other two people? Was there any reason for it?

A. Suppose you had a good personal friend that you associated with and you think you got something pretty good?

Q. *Just a personal relationship then?*

A. *Yes.*

Q. No other reason. Are they wealthy men or

well-to-do men?

A. They are all wealthy men.

Q. You knew they had the money if you could go ahead with the deal?

A. That's right.

Q. So after this one deal was completed and didn't come up to par or come up to your expectations, that's when you made up your mind you wanted your money back, and from that time on nothing has been done?

A. No, sir.

Q. And that's when the lawsuit was filed?

A. That's right." (Page 7)

From the foregoing, together with the allegations in the Wyoming action (Exhibit "A" herein), the allegations that Yates represented "that the plaintiffs and the defendant had to put up the sum of $77,500.00 in order to acquire a 50% interest," that the plaintiffs relied upon said alleged representation and that they "paid to the said Simmons *and defendant*" the amounts specified, are entirely dissipated.

At the trial of the Wyoming action Dupler testified as indicated by Exhibit "B" in the instant case reiterating, in substance, the testimony given on his deposition. However, further testimony of Dupler should be noted:

"Q. After the conversation over the telephone in Mr. Zinik's store to Newcastle, what did you next do in relation to this deal? Where did you go, what did you do?

A. Well, I done nothing any further, Bill.

Q. Did you go to any lawyers, talk to any

people?

A. No, I told—I don't recall who it was, Howard or Mr. Roe, they went up to see my attorney, Sam Bernstein. I did not go.

A. Yes, sir, I paid $15,500.

Q. When did you pay the first of that?

A. Well, the first of it, I believe, was in April, early part of April.

Q. 1954?

A. Yes, sir. I didn't pay it personally, Ben Roe paid it for me.

Q. Ben Roe advanced it for you?

A. He loaned me the money, yes, sir.

Q. Did you subsequently repay him?

A. Yes, sir. (Page 5)

* * *

Q. And Mr. Yates introduced Mr. Simmons to you after he had invited him up?

A. Yes, sir.

Q. And the principal topic of the conversation at that time was the proposition of your deal with the Aimonetto's?

A. With who? With Mr. Simmons, you mean.

Q. Mr. Simmons and Mr. Yates. You and Mr. Marcus and Mr. Simmons and Mr. Yates in this room after midnight on your first meeting.

A. I don't recall just exactly what the topic was of Mr. Aimonetto.

Q. Well, what did you talk about?

A. We talked about different things, I know one thing, as I said before, that he was brought

up for one reason, to try to prove to us that the Aimonetto's were dishonest.

* * *

Q. And you called Mr. Simmons?

A. Yes, sir.

Q. You are not positive of anything, but you know you talked about the price and had it reduced?

A. Well, we had a — we had talked about the whole deal, the whole thing had to be ironed out on the telephone, the whole deal was transacted on the telephone, called for what it states in this contract, and that was the conversation evidently that was on the telephone, because — (Page 7)

Q. Were you and Mr. Yates subsequently got together in Salt Lake, did you?

A. Well, we got together, I believe Howard and I and Mr. Zinik and Mr. Roe got together the following morning of our arrival and we talked this thing over. Yates did not come back with us. Yates stayed over. I believe it was the next day after Howard and I talked to Zinik and Roe that Yates — we had a meeting with Yates. That was the morning, or I believe that was the day that we called Mr.—

Q. *Well now, Mr. Dupler, what was your relationship with Yates at that time? Were you and Yates partners?*

A. *No, sir.*'' (Page 8)

Plaintiff Marcus, testifying in the Wyoming action, stated in part as follows:

"Q. Did you place reliance on anything other than your own judgment when you became a pur-

chaser of an interest in the lease in question?

A. Certainly. I knew nothing about the oil business, so I relied on what I was told by essentially Mr. Simmons.

Q. You say 'essentially,' what exactly that he told you did you place reliance on?

A. I placed reliance on the statement that this would be a minimum of a thousand barrel, a day well, and we would make a great deal of money on this investment if we took it, and that he would use this—this drilling tool that went out in different directions. I relied on those statements.

Q. Pardon?

A. I relied on those statements." (Page 10)

Plaintiff Zinik testified in the Wyoming action in part as follows:

"Q. Had you ever met Mr. Simmons before the day of the telephone conversation from your place of business to Newcastle?

A. No, sir, I did not, sir.

Q. When did you first learn of the fact that an interest might be purchased in the 40-acre lease involved in this case?

A. *When Joe Dupler came from Newcastle.*

Q. *And from whom did you learn it?*

A. *From Joe Dupler and Howard — Howard Marcus.*

Q. Did they relate to you anything that purportedly or reputedly had been given to them by Mr. Simmons at Newcastle —

A. Yes. ***

Q. Yes. And what did they tell you? That is,

that they had learned from Mr. Simmons about this property, this 40-acre tract?

A. Well, the way they brought it out for me, they learned — they thought it's a very, very good deal and Mr. Simmons is a very (Page 12) fine fellow and knows what he is doing and knows how to drill a well.

Q. What else?

A. And I'm sure we can trust them, and he was going to drill a well entirely different than the others, and so — they explained it to me with these different ways of drilling it, four or five different ways, that it extends, and that the well is going to bring in at least a thousand barrels of oil a day, and that we get our money out of it within ninety days and we'll more than double our money within a year and a half.

MR. HICKEY: May I ask the Court, is it now the state of the record admitted that Dupler and Marcus and Yates were the agents of Zinik and Roe? Is that the theory that this is going in on?

MR. BROWN: I don't think there is any theory that Yates was an associate at all. It isn't intended by us.

* * *

Q. Now, Mr. Zinik, I am going to ask you this. At the time you elected to go into this venture, which I take from your testimony to be at the time of the telephone call or about that time, did you rely upon anything other than your own knowledge of the area where the oil was located? (Page 13)

A. Yes, sir.

Q. Did you have any independent knowledge of the oil activities around Weston County, Wyoming?

A. Absolutely nothing.

Q. None at all?

A. No.

Q. Upon what did you rely in making that investment?

A. Well, I relied on Mr. Simmons. It was brought out that he was an honest fellow and we can trust him—

Q. Did you place any reliance upon what Mr. Dupler and Mr. Marcus reported to you as the representations of Mr. Simmons at the time you elected to go into this transaction?

A. I did.

Q. *Is that all that you relied upon in going into it?*

A. That's right." (Page 14)

Plaintiff Roe testified in the Wyoming action in part as follows:

"Q. Now coming back to the meeting in the Mayflower Cafe, did Mr. Dupler or Mr. Yates advise you or state to you things which were reported to you as representations of Mr. Simmons in respect to the oil and gas lease involved in this case? Just yes or no.

A. Yes. With — may I make this correction, please?

Q. Yes.

A. Mr. Yates was not present.

Q. I am sorry, I misnamed the parties.

A. Yes.

Q. Present besides yourself and Mr. Zinik were Mr. Dupler and Mr. Marcus?

A. Mr. Dupler, Marcus, Zinik and I.

Q. And was it Mr. Dupler and Mr. Marcus who had been to Newcastle, is that right?

A. Right.

Q. Now did they advise you, those who had been and just returned from Newcastle, did they (quote) to you anything that Mr. Simmons represented about the oil and gas lease involved in this case? Just yes or no.

A. Yes. (Page 15)

* * *

A. One of the first things that was relayed to me that Mr. Simmons is an oil and gas man, he knows a great deal about oil and gas. Mr. Simmons told them that that piece of property—the description of which I don't know—is a very fine piece of property, it will be one of the finest wells in that part of the country, that they contemplate using a special tool that has recently been patented and he had the right to use it, and the—to be expected that a well will be in excess of a thousand barrels a day, it will pay out in three months and maybe double in eighteen months. It is going to be the biggest well in that part of the country.

Q. Did you place any reliance on these quoted statements at the time you entered into this venture?

A. Naturally. (Page 16)

* * *

Q. Now I understand from your testimony, that

you became interested in what has been referred to here as the Aimonetto leases and that you became interested in those the latter part of February or early part of March, 1954, is that correct?

A. That's right, sir.

Q. Now isn't it a fact that you became interested in those through representations made by Mr. Joe Dupler?

A. No, sir.

Q. Well, who made the representations that interested you in those?

A. The day happened to be Washington's Birthday, 22nd of February, I happened to be in Las Vegas, Nevada, and there I met one of the Aimonetto boys and Mr. Yates, and I talked to them about it and they were telling me that Joe Dupler and—well, the family, has made a little investment in it, so we kept on talking, and I had been away and I took the telephone and I talked to Joe Dupler in Palm Springs, California, and just asked him what did he think about it or what did he know about it. He said, 'Well, I don't know much about it except I put up my money.' I said, 'Well, I go back, maybe I will invest a little money.' Which I did.

Q. Now did anyone tell you, Mr. Roe, that the Newcastle country in Wyoming was generally booming and making a lot of money in oil?

A. I don't recall at that time in February when I was in Las Vegas anybody telling me that.

Q. Now you testified as to the persons upon whom you relied for this particular venture. That is, the Taylor No. 34 venture.

A. Yes, sir.

Q. I think you said you relied upon the statements made by Mr. Marcus and Mr. Dupler with regard to the representations they made about Mr. Simmons.

A. That's right, sir.

Q. Well, I'll try to rephrase it. Did Mr. Marcus tell you he had no more knowledge of Mr. Simmons than what he had acquired in several meetings in a twenty-four hour period?

A. That's right.

Q. You know that he didn't know him very well?

A. Well, only to the extent he told us.

Q. Well now, what did Mr. Dupler tell you about how long he had known him?

A. He has known him about that length of time or (Page 17) longer, I don't recall just exactly, and he told me and he told the group that to the best of his knowledge the gentleman in question, Mr. Simmons—first, that he knew the oil business, second, he was honorable. Those two things was the most important information I received. Those two things I based my decision, those are very important facts.

Q. Yes, sir. Now you were relying on what Marcus and Dupler said, you had never seen Simmons, isn't that correct?

A. That's right, sir.

Q. *So you placed all your reliance on the statements made by Mr. Dupler and Mr. Marcus, is that correct?*

A. Right, sir." (Page 18)

The foregoing disproves the allegations in the fourth cause of action that Yates represented that he had put up the sum of $15,500.00 for his 10% interest in the Simmons transaction; that he represented to the plaintiffs that he was acting in their behalf and not for Simmons and the plaintiffs alleged reliance upon said purported representations. Paragraph VII of the fourth cause of action (R. 41) is common to all of the various causes. The allegation is to the effect that defendant was a successful investor with a "great amount" of experience in the investment field; that he had formed a fraudulent scheme to induce members of the public to invest in oil and gas leases in Wyoming and to make representations that he, himself, was investing, fraudulently concealing the fact that he had made prior arrangements with the Aimonettos to receive either an interest in the lease or part of the money paid by members of the public for getting them to so invest.

It is alleged that Yates made the "foregoing representations" to plaintiffs with the express purpose of inducing them to invest money in the leases; and

> "that because of the statements of the defendant said plaintiffs came to rely *to a great extent* upon the said defendant and relied upon defendant's statements that he was investing money in said oil and gas leases and a confidential relationship existed between defendant and plaintiffs. If plaintiffs had known that defendant was to receive an interest in said wells, or money, they would not have invested therein without *further extensive investigation.*"

The testimony of the plaintiffs in the Wyoming action against Simmons belies the allegations of said paragraph VII. It is clearly shown that the plaintiffs, all of whom are successful business men, exercised their own judgment in the premises and they relied upon the statements and representations of Simmons, fantastic as they were, communicated to them personally by Simmons, or relayed through Dupler who stated under oath that he was their agent. Furthermore, the allegations with respect to the alleged scheme on the part of the defendant are equivocal as are the statements that the plaintiffs, or any of them, relied upon any representation that defendant himself was investing money in the leases. The previous testimony of the plaintiffs contradicts the materiality of the alleged representations attributed to defendant by said paragraph VII and the similar allegations elsewhere in the complaint.

Under the Federal rule identical with Rule 9(b), *Utah Rules of Civil Procedure,* the Court of Appeals for the District of Columbia in *Merchant v. Davies,* 244 F.2d 347, held that the phrase "known or should have been known" did not meet the requirement that in all averments of fraud and mistake the circumstances constituting fraud or mistake shall be stated with particularity. We submit that the equivocal allegations as contained in paragraph VIII are not sufficient, particularly in face of the unequivocal prior testimony and the allegations as contained in plaintiffs' complaint against Simmons in the Wyoming action.

The materiality of the conduct attributed to defendant by the expressions similar to those contained in paragraph VII of the fourth cause of action is not apparent and that it must be made so is the holding of this Court in *Davis Stock Co. v. Hill,* supra, expressly stating that one of the basic elements of pleading a cause of action based upon fraud "is the materiality of the alleged false representations." The Court cites *Stuck v. Delta Land & Water Co.,* 63 Utah 495, 227 P. 791; *Oberg v. Sanders,* 111 Utah 507, 184 P.2d 229; *Pace v. Parrish,* 122 Utah 141, 247 P.2d 273.

It is not denied in the record that Dupler was acting in the Simmons transaction on his own account and for the account of his co-plaintiffs. He conducted the bargaining with Simmons, reducing the asking price from $90,000.00 down to $77,500.00. He and his co-plaintiffs were persuaded by the statement of Simmons that the well to be drilled on the property "would be a cinch, not less than 1000 barrels a day" and that a gadget or device would be used which would make not one but five holes in the drilling operation. The plaintiffs were persuaded by the statement that they attribute to Simmons that the income would be $2400.00 a day and that the "box car numbers" meant their original investment would be returned to them within eighteen months. After successfully prosecuting their action against Simmons they carelessly disregard that proceeding and their sworn testimony by fictitious allegations against Yates, leaving to him the burden of showing through the medium of the summary judgment proceedings that in reality there is

no genuine issue as to any material fact.

POINT III.

THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT INVOLVING THE AIMONETTO TRANSACTIONS.

The allegations with respect to the alleged misrepresentations, the materiality of the same and reliance are obscure and confusing throughout the entire amended complaint. We differ from plaintiffs in their statements concerning the same. The first three causes of action, dealing with the Aimonetto leases, contain substantially the same allegations, varying with the interests sold and the amounts paid. In the first cause it is alleged that defendant represented that the purchase price of an undivided one-fourth interest would be the sum of $60,000.00 and that he had paid $30,000.00 for one-half of said interest. Contrary to the statement on page 3 of plaintiffs' brief, there is no allegation in the complaint that the defendant represented the "worth" or value of any oil well or property. It is alleged that defendant represented himself to be acting for and on behalf of Dupler, when in fact he was representing himself and the Aimonettos. The direct allegation of reliance is confined to the alleged representations of the purchase price, the payment by the defendant of the amount specified and that defendant was acting for the plaintiff Dupler. Paragraph VI of the first cause of action is the same statement as contained in paragraph VII of the fourth cause of action, which we have discussed above.

Contrary to the allegations of misrepresentation and

of reliance, and reflecting upon materiality in the instant case, Dupler asserted in the Wyoming action against the Aimonettos that he had been defrauded by them in the particulars described in subparagraphs (a) through (r) of paragraph 3 of his second and third causes of action therein (Pages 4-10, Exhibit "D"). Among the allegations are the statements that on or about December 20, 1953, Joe Aimonetto represented *in person* to Dupler *as an inducement* to get Dupler to purchase the identical security alleged in the first cause herein that the well drilled on said property had a greater prospective income producing power and value and was producing at a rate greater than it was in fact. That Dupler was induced to purchase the interest by direct contact with the Aimonettos and by what they had to say about the wells remains unchallenged in this record. The plaintiffs do not allege that Yates made or joined in the representations attributed to Aimonetto. The things that they say Yates represented were matters separate and apart from the things that the Aimonettos did and said that *induced* the purchase of the interest, therefore the alleged misrepresentations on the part of Yates are collateral and immaterial.

The third cause of action, likewise on behalf of Dupler, concerns a 5% interest in a well on Section 2 as covered by the Aimonetto lease. While paragraph 7 of this cause contains the same equivocal allegations as contained in the same paragraph of the fourth cause of action, it particularizes on the item of $7,000.00, which item it is alleged defendant falsely represented that he

had paid to the Aimonettos for Dupler and that in reliance on the representation Dupler paid the amount to Yates. Again these allegations are refuted by the allegations of the Dupler action in Wyoming against the Aimonettos.

The portions of paragraphs 8 and 9 of Exhibit "D" quoted above are to the effect that the cash consideration of $7,000.00, plus a portion of the completion costs of the well, for a 5% interest was agreed to between Dupler and the Aimonettos by long distance telephone between Newcastle, Wyoming, and Palm Springs, California, and that on March 5, 1954, the Aimonettos assigned the interest to Dupler for which he paid the Aimonettos the cash consideration of $7,000.00. The discrepancy between the allegations in the instant case and the allegations of direct payment of the item by Dupler to the Aimonettos, as alleged in the Wyoming case, are not explained in the present record and, therefore, the trial court was justified in holding that no genuine issue was raised in that respect. The integrity of the pleading is challenged in this as it is in other particulars.

The second cause of action brought by plaintiffs Dupler, Roe and Zinik also involves the well on Section 2 covered by the Aimonetto lease. The interests and the amounts paid therefor were the subject of the separate suits brought by said plaintiffs against the Aimonettos in Wyoming and which are outlined above. The allegation is that Yates represented that he had put up $17,500.00 when in fact he had not; that he was acting in the

transaction on behalf of the plaintiffs when in fact he was representing himself and the Aimonettos; that the representations were false and were made for the purpose of inducing the plaintiffs to put up their money for the drilling of the oil well. Paragraph VII is the same as paragraph VII of the fourth cause of action.

In the Aimonetto actions Dupler, Roc and Zinik separately repudiated and rescinded all of the transactions with the Aimonettos on the grounds of fraud and deceit allegedly practiced upon them by the latter. As to Well No. 2 on Section 2 Dupler, in the Aimonetto suit, alleged as against the Aimonettos the acts and omissions recited in subparagraphs (n) through (r) of paragraph 3 of his second and third causes of action (Pages 7-10, Exhibit "D"), among which is the allegation that by contract with the Aimonettos he was to deposit $17,500.00 as his share of the costs of drilling Well No. 2 with the Union State Bank, Upton, Wyoming, as escrow agent. Roc in his action against the Aimonettos alleged that the payments of $7,000.00 and $3,500.00 were made by him to the Aimonettos in payment of a 5% and 2½% working interest respectively in the same well, which interests were negotiated for on or about February 22, 1954, at a time when Roc and Joe Aimonetto were present in Las Vegas, Nevada. See subparagraphs (a), (c), (e) and (f) of the second cause of action and paragraph 5 of the first cause of action of the Roc-Aimonetto complaint (R. 65-69).

Zinik, while making substantially the same allega-

tions against the Aimonettos as did Roe, alleges that his communications with the Aimonettos were by mail in interstate commerce. In subparagraph (e) of paragraph 3 of the second cause of action of the Zinik-Aimonetto suit (R. 79) there is an allegation that on or about February 25, 1954, the Aimonettos "by and through their agent" represented to plaintiff at Salt Lake City that Well No. 2, to be drilled by the Aimonettos on Section 2 had a producing potential and capacity equal to or in excess of Well No. 1. The agent is not named.

Common to the two separate actions brought respectively by plaintiffs Roe and Zinik against the Aimonettos in Wyoming, with respect to their respective investments in Well No. 2, is the allegation that on or about February 9, 1954, the Aimonettos caused a notice to be published in the Salt Lake Tribune, which publication "was intended to, and actually did, induce plaintiff and others to buy fractional undivided interests in oil and gas rights in Well No. 2 which was to be drilled by defendants (Aimonettos) on a part of the same and identical oil and gas lease, namely, the SW¼SW¼ of Section 2 ***." (R. 69-70, 79).

Plaintiffs Dupler, Roe and Zinik, by their allegations in the Wyoming actions, have refuted the materiality and their reliance upon any of the alleged misrepresentations attributable to the defendant by the first three causes of action in the present suit. At the most the alleged misrepresentations attributable to Yates are collateral to the direct negotiations between the plaintiffs

and the Aimonettos in the instances pointed out above and to the matters that the plaintiffs said induced them to purchase the fractional interests, such as newspaper items of production in the field, direct representations as to the potential of the wells and other matters pointed out. The general rule that a false representation of a collateral matter does not satisfy the requisites of materiality is well stated in 23 *Am. Jur.,* Fraud and Deceit, Section 113, page 896:

> "Immateriality of Collateral Matters. — In order to fall within the requisites of materiality essential to predication of fraud on their existence, representations must be relevant to the subject of a contract and must be as to some subject material to the contract itself, as distinguished from matters which are merely collateral thereto and do not constitute essential elements thereof. For example, it has been held that representations which merely affect the probability that the contract will be performed are collateral to it, and do not constitute actionable fraud. It has been held, however, that they need not relate directly to the nature and character of the subject matter of the contract, but that it is sufficient if they are so closely connected with the contract that the parties would not, except for the representations, have entered into it, and by such representations were induced to enter into it to the knowledge of the other party."

The matters stated by the plaintiffs in the Wyoming actions by way of inducement destroy the causal relationship between what they now allege against Yates and their damage. That there must be a causal relationship

is the holding of this Court in *Fillmore Commercial & Savings Bank v. Kelly*, 62 Utah 514, 220 P. 1064, where the Court stated:

> "It is necessary to show not only what the fraud was, and that injury has been sustained, but also the connection of the fraud with the alleged damage, so that it may appear whether the fraud and damage sustain to each other the relation of cause and effect, or at least whether the one might have resulted directly from the other. 1 Bigelow on Fraud, 115."

There are other matters that were before the trial court that are equally as devastating. Each of the Aimonetto actions was dismissed by the respective plaintiffs with prejudice and the plaintiffs joined with plaintiff Marcus in the agreement with the Aimonettos dated August 20, 1956, and mentioned above. They expressly agree that all claims and accounts existing between said parties up to and including the date of the agreement were discharged, released, settled and compromised (R. 61). This is in addition to the fact that in the Wyoming actions, both as against Simmons and Aimonettos, the plaintiffs elected to rescind all of the transactions.

The plaintiffs, having elected to rescind the transactions, cannot now take the contrary position and sue for damages. See *Cook v. Covey-Ballard Motor Co.*, 69 Utah 161, 253 P. 196, where the philosophy of the rule is discussed at length.

The agreement between plaintiffs and the Aimonettos (R. 57-61) was an accord and satisfaction of all claims

relating to the transactions between the parties, which the plaintiffs in their brief identify as Wells 1 and 2. We contend that the agreement was equally a release of Yates as an alleged joint tortfeasor, there being no reservation of rights as against him and the instrument not being a covenant not to sue. The general rule that a person injured by a joint tort has a single and indivisible cause of action, and that when the right of action is once satisfied it ceases to exist, is pointed out by this Court in *Dawson v. Board of Education, Etc.,* 118 Utah 452, 222 P.2d 590. The Court also held that it was unnecessary, in light of the general principles stated, to reconcile the provisions found in the various sections of our statute dealing with obligees and obligors (Section 15-4-1 to Section 15-4-7, and particularly Section 15-4-4, *Utah Code Annotated* 1953). The reference made by plaintiffs to 52 *Am. Jur.,* Torts, Section 128, page 465, states that the conclusiveness of the judgment extends to the parties of record and persons in privity with them. The allegation in the instant case is that Yates was acting as the agent for Simmons and the Aimonettos.

In *Greenhalch v. Shell Oil Co.,* (C.C.A. 10), 78 F.2d 492, the Utah statutes mentioned last above were construed and applied. At the time the release was drawn defendant's connection with the premises was not known "and manifestly it was not intended to reserve rights against an unknown," nevertheless the Court held that the general release discharged the unknown defendant.

While the judgment involving the Simmons trans-

actions was not before the trial court on the motion for summary judgment, nor was the dismissal of the appeal by the stipulation of the parties as reported in 268 F.2d 217, nevertheless, the trial court had the advantage of the testimony of the various plaintiffs as outlined above, which testimony, coupled with the allegations in the action brought against Simmons, showing, as it does, that the plaintiffs were induced by the acts and statements of Simmons, matters not here attributable to the defendant, makes the authorities cited above on the question of materiality and collateral immaterial matters equally applicable.

POINT IV.

THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT.

The fifth cause of action (R. 45-48) attempts to allege a fiduciary relationship in the acquisition of the various interests. It is alleged "that the plaintiffs relied upon the said defendant as their agent and representative and as a partner with them in the investing of money in the said three oil wells." In support of the quoted statement it is alleged that during the month of January and through May of 1954 the defendant contacted the four plaintiffs and interested them in the investing of money in the three oil wells, representing that he was investing money in the wells along with the plaintiffs "and represented to them *and acted as though* he were the agent" of the plaintiffs in securing interests in the wells. We submit that the allegations do not support the claim of agency or partnership or of joint venture,

which terms are used indiscriminately in the pleading.

Assuming for the purpose of argument only, and not conceding that the allegations are sufficient to support the claim of agency, partnership or joint venture, it is to be recalled that the various interests in the three oil wells were transferred to each of the plaintiffs separately; that three of the plaintiffs maintained their separate actions against the Aimonettos alleging direct contacts with them; that all four of the plaintiffs, to the exclusion of the defendant, entered into the Aimonetto agreement for the reworking of Wells 1 and 2, and that all four of the plaintiffs joined as such in the action against Simmons (Exhibit "A"). In the Simmons action Dupler was asked: "This agreement was between you and Yates and Simmons?" Dupler answered: "No, but I was the agent for Mr. Zinik and Mr. Roe and Mr. Marcus." Dupler was also asked: "Is Yates still in this deal?" And he answered: "Sir, I couldn't tell you what deal he is in." (Page 4, Exhibit "C"). In answer to the question: "So you relied on Yates who was your partner?" Dupler replied: "I didn't rely upon Yates to turn the money over. I saw the Schlumberger." (Page 5, Exhibit "C"). In answer to the questions: "Well now, Mr. Dupler, what was your relationship with Yates at that time? Were you and Yates partners?" Dupler replied: "No, sir." (Page 8, Exhibit "B").

While the allegations with respect to the breach of what is now alleged to be a fiduciary relationship are rather obscure, it would seem that plaintiffs are con-

tending that in connection with Wells 1 and 2 Yates had an agreement with the Aimonettos that he would be given an interest in the wells if he were able "to interest" the plaintiffs in investing their money therein, and that as to Well No. 3 Yates had an agreement with Simmons to be given an interest without the payment of any money and that he would be paid a commission in the event the plaintiffs invested in that well. Then follows the allegation that had the plaintiffs known that Yates was "promoting" the sale of the oil wells and was receiving an interest and compensation for getting the plaintiffs to invest money therein, the plaintiffs would not have relied upon "his word" and would not have invested money in the projects without "further investigations."

Aside from the fact that the alllegations are so vacillating and uncertain as to be meaningless, they are refuted by the record. The allegations with respect to agency are unilateral in the sense that it was the defendant who represented himself "and acted as though he were the agent" of the plaintiffs. The plaintiffs avoid a statement that they designated the defendant as their agent and outlined the course and scope of the agency. They say that they relied upon the defendant "as their agent" in investing the money, but they do not say what the agent did on their behalf or what they were confirming by such reliance.

In 2 *Am. Jur.*, Agency, Section 21, page 24, it is said:

"Necessity of Consent of Parties. — As between

> principal and agent, an agency is created and authority is actually conferred very much as a contract is made, to the extent that the creation results from the agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. Otherwise stated, consent of both principal and agent is necessary to create an agency. The principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

The fact that the plaintiffs do not seek recourse against the defendant on the theory of unjust enrichment or of a constructive trust, and that they omit factual statements pertaining to the creation of an agency by a bilateral agreement, are all indicative, it seems to us, of the fact that there is a deliberate effort to avoid the consequences of an agency on their part while seemingly to allege it. Even though Dupler testified that he was the agent for his co-plaintiffs, there is a studious attempt to avoid a partnership or joint venture arrangement between them, each taking and paying for their separate interests, and Dupler testifying, as pointed out above, that he was motivated by friendship in interesting the co-plaintiffs in the transactions. The trial court properly disregarded as being sham and illusory the assertion of agency, partnership and joint venture as between the plaintiffs and the defendant Yates.

POINT V.

PLAINTIFFS' ACTION IS BARRED BY SUBSECTION (3) OF SECTION 78-12-26, *UTAH CODE ANNOTATED* 1953.

Plaintiffs attempt to avoid the consequences of the statute of limitations by the allegation that they had no knowledge of the alleged fraud until June 1956. The record refutes this allegation. In the Wyoming actions the allegation is that the various plaintiffs learned of the fraud and deceit therein complained of during the month of June, 1954. Dupler testified that he learned that Yates was "pulling off a lot of shenanigans" in February of 1954, identifying the incident with the time that a man by the name of Blackwell, mentioned in the Aimonetto suits, had threatened to shoot the witness (Exhibit "B," page 8). Marcus testified that he became skeptical of the investments made in the Newcastle area the first part of June 1954, which skepticism was discussed with Dupler, Roe and Zinik (Exhibit "B," pages 11 and 12).

The affidavits of Dr. Merrill and Messrs. Anderson, Bowman, Flint and Lee speak for themselves and corroborate the position taken by the various plaintiffs in the Wyoming actions and their testimony to the effect that the plaintiffs knew of defendant Yates' alleged acquisition of interests in the Newcastle area during the months of June and July, 1954, and prior thereto. The affidavit of Mr. Flint (Exhibit "J") attributes to Dupler a statement made about the month of July or August, 1954, that he, Dupler, would not recommend that affiant "go along further or make an additional investment with Maurice Yates." This affidavit, which is not denied, attributes to Dupler lack of confidence in Yates. The affidavit of Maurice Anderson (Exhibit "K") attributes

to Dupler a statement made during the month of June or July 1954 "to beware of Maurice Yates, and that the oil properties in Weston County, Wyoming, in which affiant had interests in, were worthless." This affidavit is not denied and discloses Dupler's lack of confidence in Yates at the times stated. Zinik and Dupler attempted to contradict portions of the other affidavits by argumentative counter statements (R. 26-29), but the undisputed fact remains that there was much talk "up and down the street" by Dupler, the spokesman and agent for the plaintiffs, through the Spring and early Summer of 1954, all connected with the time that the plaintiffs concluded that their Wyoming deals were "sour."

In *Jones Min. Co. v. Cardiff Min. & Mill. Co.*, 56 Utah 449, 191 P. 426, the statute of limitations applicable to fraud was applied to a situation where constructive or implied trusts arise as distinguished from an express trust. The Court, following *Gibson v. Jensen*, 48 Utah 244, 158 P. 426, held that in all such cases the statute begins to run from the time that the complaining party discovered the wrongs complained of, or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence or prudence upon inquiry. In *Taylor v. Moore*, 87 Utah 493, 51 P. 2d 222, it is held that means of knowledge is equivalent to knowledge and that a party who has the opportunity of knowing the facts constituting the alleged fraud cannot be inactive "and afterwards allege a want of knowledge that arose by reason of his own laches and negligence," citing *Salt Lake City v. Salt Lake Inv. Co.*,

43 Utah 181, 134 P. 603.

The record shows occurrences happening more than three years prior to the commencement of this action inconsistent with agency, partnership or joint venture. Yates was present when Simmons attempted to persuade Dupler that the Aimonettos were dishonest. This was in March, 1954. The actions subsequently brought against the Aimonettos were by the individual plantiffs and were not on the theory of partnership or joint venture. Yates was not joined in the actions nor was he a party to the settlement with the Aimonettos. Dupler testified in the Simmons suit that Yates was neither a partner nor an agent. The Simmons transaction was negotiated by Dupler in the presence of the co-plaintiffs and Yates. Dupler's attorney prepared the purchase and sale agreement. Each of the plaintiffs alleged direct contacts with Simmons; that they were induced to invest their money by newspaper accounts; the promise of fantastic monetary rewards held out to them by Simmons, to say nothing of the intriguing gadget that Simmons said would result in not one well hole but five.

In *Felkner v. Dooly,* 28 Utah 236, 78 P. 365, it is held that when the trustee denies the trust and assumes ownership of the trust property, or denies his liability or obligation under the trust relation in such manner that the cestui que trust has actual or constructive notice of the repudiation of the trust, "then the statute of limitations attaches and begins to run from that time, for such denial or adverse claim is an abandonment of the fidu-

ciary character in which the trustee has stood to the property."

In *Gibson v. Jensen,* supra, there is a statement that mere concealment of the agency, if such be done, is not such fraud as will toll the statute. We make reference to this statement because of the possible implication that the gravamen of the action is the alleged agency undisclosed between Yates on the one hand and the Aimonettos and Simmons on the other hand. The position that plaintiffs seem to take on this score is just as confusing as are the allegations contained in their complaint, mainly for the reason that the record shows that the plaintiffs dealt directly with the Aimonettos and with Simmons and not with Yates, and not thinking that Yates was the principal while in fact he was an undisclosed agent. The statement in the *Gibson* case that the concealment of the agency is not such fraud as will toll the statute means, it seems to us, that if plaintiffs' action is barred against the principals (Aimonettos and Simmons) it would be barred against Yates, and that the fact that the alleged agency between Yates and his alleged principals was not disclosed would not toll the statute. Therefore, the allegation that the fraud by Simmons and the Aimonettos was discovered during the month of June 1954 would be available to Yates, and the statute would not be tolled by the assertion that the agency relationship was not discovered until a later date.

This action, unlike the case of *Kamas Securities Co. v. Taylor,* 119 Utah 241, 226 P.2d 111, relied upon by

plaintiffs, is based on fraud and deceit. In the *Kamas Securities Co.* case the defendant, as secretary of the plaintiff corporation, had possession of thirty shares of Kamas State Bank stock held by plaintiff as security on notes of a third party. Contrary to instructions defendant surrendered the stock to the maker of the notes. There was a specific allegation that the defendant was secretary of the plaintiff corporation during the period in question "Thus, there is stated a cause of action against defendant as a corporate officer for breach of his fiduciary duty." In holding the four year statute of limitations to be applicable, the Court stated that while the allegations of the amended complaint charged that the defendant employed deceit "the charge in its entirety (it) is clearly one of breach of a fiduciary duty which would mean that the four year statute of limitations would be applicable."

Through the medium of the affidavit of Dupler (R. 28-29) the plaintiffs contend that they were "lulled into a false sense of security" in the Fall of 1954 when it is claimed that Dupler questioned defendant as to whether he had paid "his share in the oil well transactions" and defendant told Dupler that he had paid by checks, "but he at that time refused to let affiant see the checks." Dupler claims that he informed defendant that unless the checks were produced a suit "for an accounting" would be filed. It is then claimed that in the fore part of 1955 defendant disclosed some checks which covered the payments defendant was supposed to have made; that the disclosure of the checks lulled affiant into a false sense of security;

that he then believed that the defendant had paid his share and that in June of 1956 affiant "for the first time" learned that the checks shown to him the fore part of 1955 were false.

As stated above, it was immaterial whether Yates had paid for the interests allegedly assigned to him. The plaintiffs acquired their interests from the Aimonettos and Simmons independent of the interests they say were transferred to defendant. The payments made by plaintiffs to the Aimonettos and to Simmons were induced by matters entirely unrelated to Yates and were the result of separate and independent bargains. The plaintiffs were persuaded by representations of the prospective income producing power of the wells, the use of a special gadget in the drilling operation, newspaper accounts of production, the result of the Schlumberger test and other matters to the exclusion of the amount that Yates might have paid for his interests. Furthermore, the alleged fraud centering around the acquisition of the interests was discovered by the plaintiffs, according to their own allegations in the Wyoming actions, in June of 1954, including the alleged fact that "free interests" and identical interests had been assigned to "another" for a stated consideration and the alleged falsity of the same, all occuring prior to the time stated in the Dupler affidavit.

In *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670 (9th C.), the theory of a concealment of the alleged fraud as tolling the statute of limitations was rejected. It was

specifically held that restatements of the fraudulent representation do not of themselves constitute a concealment, and that where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate "by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations." The subject is annotated in 107 A.L.R. 589. The immateriality of the alleged representation that Yates paid anything, let alone an equal amount, for any interest, and the fact that the plaintiffs did not rely upon such representation, makes the rule even more applicable in the instant case.

This Court in *Peteler v. Robinson,* 81 Utah 535, 17 P.2d 244, subscribes to the general rule that, in the absence of a trust or fiduciary relation between the parties, a failure or withholding of known facts or concealing of them by the alleged responsible party, and of which the other party is ignorant and which go to make up or give a right to a cause of action is not such a fraudulent concealment of the cause of action as to prevent the running of the statute. In the instant case the plaintiffs did not supplement the record or in any way assert a fiduciary relationship placing upon Yates the duty of disclosure in the Fall of 1954, the fore part of 1955 or June of 1956, the times specified in the Dupler affidavit or, for that matter, at any other time. The case of *Kalkruth v. Resort Properties,* 134 P.2d 513, relied upon by the plaintiffs, dealing with the problem of the timeliness

of efforts to rescind a real estate contract, is not in point.

CONCLUSION

As in *Richards v. Anderson,* 9 Utah 2d 17, 337 P.2d 59, the plaintiffs attack the summary judgment as arbitrarily depriving them of their right to a trial and to fully present their evidence and contentions. The salutary purpose of the rule "of not requiring the time, trouble and expense of trial, when the best showing the plaintiff could make would not entitle him to recovery under the law," as stated in the *Richards* case, counters the criticism of the rule.

Contrary to the generalities indulged in by the plaintiffs, we have detailed the matters that were before the trial court resulting in its determination that there is no genuine issue of fact. Considering all of the evidence and every inference fairly to be derived therefrom in the light most favorable to the plaintiffs, the genuineness of the issues that they attempt to raise is dissipated. The trial court properly determined that prior statements of inducement and reliance made the allegations presently sought to be alleged nothing more than a fiction, likewise the allegation with respect to the alleged fraud as having been discovered in June of 1956. Among the fictions indulged in the instant case, and which should not be countenanced under any system of pleading, are those with respect to agency, partnership and joint venture and the reliance by the plaintiffs upon any representation allegedly made by defendant.

Nothing is said in the complaint about the Wyoming proceedings which were premised upon fraud and deceit and matters of inducement in direct contradiction to the matters presently attempted to be alleged. In Wyoming the plaintiffs expressly stated under oath that there was no partnership with Yates. They relied upon direct negotiations with Simmons and the Aimonettos, charging that they were induced to purchase the various interests by means of false representations independent of anything that they claim against the present defendant. The plaintiffs settled their controversy with the Aimonettos, which involved the $7,000.00 item that Dupler alleged he paid to Yates and that he claims Yates failed to pay to the Aimonettos. The motion for summary judgment disclosed the falsity of this allegation. If there was any agency it was between Dupler and his co-plaintiffs as disclosed by the sworn testimony in the Wyoming proceedings. The motion for summary judgment disclosed the untruthfulness of the allegations relied upon to toll the statute of limitations.

One of the virtues of a motion for summary judgment under our present rules is the opportunity that it affords to point out to the court prior to trial the fictitious premise of the document which invites the jurisdiction of the court. Under the notice form of pleading permitted by our Rules of Civil Procedure a motion for

summary judgment in many cases, and particularly in the instant case, is the protection afforded against sham and fictitious allegations short of trial. The judgment appealed from should be sustained.

Respectfully submitted,

HALLIDAY & HALLIDAY
GUSTIN, RICHARDS & MATTSSON

Attorneys for Defendant and Respondent